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No. 208

Supreme Court of the United States

OCTOBER TERM, 1948

GULF COAST WESTERN OIL CO., INC.,
Petitioner and Appellant below,

VERSUS

M. E. TRAPP,
Respondent and Appellee below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND SUPPORTING BRIEF

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July, 1949.

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Supreme Court of the United States

OCTOBER TERM, 1948

GULF COAST WESTERN OIL CO., INC.,
Petitioner and Appellant below,

VERSUS

M. E. TRAPP,
Respondent and Appellee below.

PETITION FOR WRIT OF CERTIORARI

May it please the Court:

The petitioner, Gulf Coast Western Oil Company, Inc. (Arizona), respectfully petitions this Honorable Court for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

STATEMENT OF THE MATTER INVOLVED

Should a decision of the United States Court of Appeals, which in effect nullifies a vital section of the limitations statute and overrules the Supreme Court decisions of the two states, be permitted to stand?

The limitations statutes involved are identical in the States of Oklahoma and Kansas: Oklahoma having adopted the statutes in question from the Kansas Code.

The decision in question sets out this fact, incorporates decisions from both the states of Kansas and Oklahoma and

will have far reaching effect on the local law of the two states.

Petitioner, Gulf Coast Western Oil Company, was formerly named Farmers Mutual Royalty Syndicate, Inc. For simplicity the petitioner is herein referred to as "Farmers Mutual" (R. 1).

The action is one for accounting brought by petitioner against its former officers charging fraud and misappropriation of funds and property belonging to the petitioner. It was originally commenced under order of the United States District Court for the Western District of Oklahoma, directed to that court's receiver who had been appointed to re-organize the company after a minority stockholder's suit had removed the existing officers of the company for fraud (R. 19-22).

Upon the completion of the re-organization, the litigation was refiled and proceeded in the name of the petitioner.

Defendant Trapp is a former officer of the petitioning corporation and was charged along with other officers with a number of frauds.

After the present action was begun in December, 1943, the new officers of the Farmers Mutual learned of a quiet title suit having been brought in the District Court of Garvin County, Oklahoma, in November, 1938, by the defendant, Trapp, involving one hundred twenty (120) acres of land, under which Farmers Mutual owned a one-half undivided interest in the oil, gas and other minerals.

In the quiet title action, Farmers Mutual was named as a party defendant. No summons was issued or process served upon it.

The plaintiff, Trapp (defendant here), was represented in the quiet title action by Attorney Charles Swindall. The same attorney, Charles Swindall, filed in the quiet title action a "Disclaimer and Entrance of Appearance" presuming to act as attorney for the defendant, Farmers Mutual (R. 53).

Based upon the appearance and disclaimer filed by Attorney Swindall, judgment was entered in the District Court of Garvin County, Oklahoma, on March 13, 1939, quieting the title to the one-hundred twenty acres in Trapp and cutting Farmers Mutual out of its interest in the property (R. 54-56).

The attorney for Trapp in the quiet title action was not authorized to represent the defendant, Farmers Mutual, in that action or to file the purported disclaimer and entrance of appearance in that case.

The jurisdiction of the court in the quiet title action, as to Farmers Mutual, was solely based upon the disclaimer and entrance of appearance filed by Swindall.

Petitioner asked leave of the trial court to amend its complaint then pending in the United States District Court, by adding a charge setting out these facts and praying equitable relief against the defendant, Trapp, by reason of his fraudulent securing of the state court judgment (R. 44-56).

The trial court denied the application to amend (R. 59).

After final judgment had been entered in the trial court an appeal was taken to the United States Court of Appeals upon the ruling denying the application to amend the petition so as to include the charge of fraud in obtaining the judgment in the state court.

The United States Court of Appeals sustained the lower court's decision upon the ground that the statute of limitations had run against any relief upon the quiet title judgment (R. 111-113).

There is no question as to the Farmers Mutual owning the one-half of the minerals under the land involved except for the judgment in the quiet title action (R. 49).

The United States Court of Appeals opinion disregarded the special limitations statute relative to judgments providing that:

> "A void judgment may be vacated at any time upon motion of a party or any person affected thereby." Title 12, Sec. 1038, O. S. A. Title 60, Sec. 3009, General Statutes of Kansas, 1935,

but applied the general statute of limitations relative to fraud actions, which is two years. Title 12, Sec. 95, O. S. A., Title 60, Sec. 306, General Statutes of Kansas, 1935.

The decision of the United States Court of Appeals is directly contrary to the following decisions of the Supreme Courts of the State of Oklahoma and the State of Kansas.

Oklahoma:

—*Street* v. *Dexter*, 182 Okla. 360, 77 Pac. (2d) 707;

Griffin v. *Galbraith*, 114 Okla. 208, 247 Pac. 339;

Hatfield et al. v. *Lewis*, 110 Okla. 98, 236 Pac. 611;

Wheatland Grain and Lumber Co. v. *Dowden*, 26 Okla. 441, 110 Pac. 898.

Kansas:

—*First Nat'l Bank of Newton* v. *Grimes Dry Goods Co.*, 45 Kan. 510, 26 Pac. 56;

Steele v. *Duncan*, 47 Kan. 511, 28 Pac. 206.

The statutes and the decisions of the States of Oklahoma and Kansas have established the rule of law applicable to the situation wherein the unauthorized appearance of an attorney is the only basis for jurisdiction of the court in the entry of a judgment.

Such judgment is a void judgment and relief may be granted at any time.

THIS COURT HAS JURISDICTION

This Court has jurisdiction of the matter under Title 28, U. S. C., Sec. 1254 (1), and United States Supreme Court Rule 38-5(b), inasmuch as the United States Court of Appeals "has decided an important question of local law in a way probably in conflict with applicable local decisions."

Diversity of citizenship and jurisdiction were held to be present in a previous appeal: *Gulf Coast Western Oil Co.* v. *Trapp*, 165 Fed. (2d) 343.

The Court of Appeals' decision herein was rendered upon the 28th day of April, 1949. A timely petition for rehearing was filed and in turn denied upon the 10th day of June, 1949 (R. 114-115).

The United States Supreme Court has supervisory powers in matters involving important local law, wherein the decisions of the appellate court is contrary to the principle announced in *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, 58 Sup. Ct. 817, 114 A. L. R. 1487.

In both the States of Oklahoma and Kansas wherein real estate titles are the subject of litigations more often than in the ordinary state, by reason of the existence of oil and gas under much of the land, it is of utmost importance that the established law pertaining to judgments as effecting land titles to be maintained in a stabilized form.

The Indian lands in the State of Oklahoma which are subject to numerous raids by unscrupulous persons preying upon the Indians, accentuate the necessity of maintaining the established and accepted decisions of the Supreme Court of Oklahoma holding the unauthorized appearance of an attorney does not confer jurisdiction and a judgment based thereon is void, and subject to being vacated at any time.

QUESTION PRESENTED

Does a default judgment in a quiet title action, wherein the source of jurisdiction is the unauthorized appearance of an attorney, constitute a void judgment without limitation of time as to when relief may be sought, or a voidable judgment with a two-year limitation under the statutes and the decisions of the States of Oklahoma and Kansas?

REASONS FOR ALLOWANCE OF THE WRIT

1. The decision of the United States Court of Appeals, holding that the two-year statute of limitations applied to a judgment wherein the sole source of the court's jurisdiction was the unauthorized appearance of an attorney, is a decision of an important question of local law directly in conflict with applicable local decisions.

2. It has been the long settled law of Oklahoma and Kansas that any judgment rendered by a court is void where the only source of jurisdiction of a party emanates from the authorized appearance of an attorney.

It has been equally settled law that there is no limitation of time within which steps must be taken to obtain relief from such judgment.

3. In event the decision of the United States Court of Appeals herein is permitted to stand, the settled law of those two states will be materially affected inasmuch as a number of the Supreme Court decisions of Oklahoma and Kansas have held under the facts presented here, that such judgment is void.

4. The settled law requiring jurisdiction of the subject matter and of the parties as prerequisite to the entrance of a valid judgment should not be disrupted and overthrown.

5. The Court should not permit a fraud to be the source of obtaining jurisdiction and the means by which a person can be deprived of his property without an opportunity of being heard. The decision that has this effect will

bring discredit upon the law of the land; will hold the courts up to ridicule and will tend to undermine the Government.

6. Although denial to this petitioner of the right of an opportunity to be heard means the loss of only one property, the effect of the decision will be far reaching in the other similarly situated cases hereafter.

7. This case, if permitted to remain on the books will have the effect of completely striking that clause from the Oklahoma and Kansas statutes specifying that a void judgment may be set aside at any time.

WHEREFORE, your petitioner prays that a Writ of Certiorari be directed to the United States Court of Appeals for the Tenth Circuit to the end that this cause may be reviewed and determined by this Court, as provided for by the statutes of the United States and the rules of this Honorable Court; and that the judgment herein of the United States Court of Appeals, for the Tenth Circuit be reversed and for such further relief as to this Court may seem proper.

Respectfully submitted,

HAL S. WHITTEN,
JOE W. WHITTEN,
Counsel for Petitioner.

Dated this 21st day of July, 1949.

No.———

Supreme Court of the United States

OCTOBER TERM, 1948

GULF COAST WESTERN OIL CO., INC.,
Petitioner and Appellant below,

VERSUS

M. E. TRAPP,
Respondent and Appellee below.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

THE OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported in 174 Fed. (2d) 339. The opinion is also printed in full in the record (R. 111-113).

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, U. S. C., Sec. 1254 (1). The Circuit Court of Appeals has in this case "decided an important question of local law in a way probably in conflict with applicable local decisions." Supreme Court Rules 38-5(b).

Judgment was entered in the United States Court of Appeals on June 10, 1949 (R. 115).

STATEMENT OF THE CASE

President Theodore Roosevelt, by proclamation upon November 16, 1907, declared Oklahoma admitted to the Union as a State. The new State of Oklahoma adopted the laws of the Territory as its statutory law. The Oklahoma Territorial Government had adopted as its statutes on limitations of actions, the provisions contained in the statutes of the State of Kansas.

The Statute of Limitations involved here have been identical in the States of Oklahoma and Kansas since 1893.

The decisions of the Supreme Courts of the two states have likewise been uniform at all times, holding that a judgment entered upon the unauthorized appearance of an attorney is without jurisdiction and void and may be set aside at any time.

The decisions of the United States Court of Appeals for the Tenth Circuit in this matter holds that a two-year statute of limitations applies to a judgment rendered without service of summons or other process wherein an appearance was made by an attorney without authority.

The Court of Appeals states the facts that petitioner sought to include as an amendment to its petition in the following language:

> "That on October 12, 1934, G. T. Blankenship and Daisy D. Blankenship, executed a mineral deed to the Farmers Mutual Royalty Syndicate, covering an undivided one-half interest in a tract of land situated in Garvin County, Oklahoma; that on October 11, 1934, the Blankenships executed a quit claim deed to such land to National Bond and Mortgage Co., Inc., except-

ing therefrom the one-half interest theretofore conveyed to Farmers Mutual; that on October 15, 1934 National Bond executed a quit claim deed to such land (to Trapp), excepting therefrom the one-half interest theretofore conveyed to Farmers Mutual; that at all times since the recording of the deed to Farmers Mutual, it has been the owner of an undivided one-half interest in the minerals in such land; that Trapp filed a purported suit to quiet his title to such land in the District Court of Garvin County, Oklahoma on November 2, 1938; that he alleged his interest therein came through G. T. Blankenship and that Farmers Mutual claimed adversely to him; that no summons or other process in that action was served on Farmers Mutual; that the pleadings in such state court case were signed by Charles Swindall as attorney for Trapp; that Swindall filed an entry of appearance and disclaimer in the state court suit for Farmers Mutual; that Swindall was not authorized nor empowered so to do; and that on the basis of such entry of appearance and disclaimer, Trapp obtained a judgment quieting the title in him as against Farmers Mutual, the oil company, prayed for a decree directing Trapp to execute proper instruments to Farmers Mutual clearing the title to its undivided one-half interest in such land" (R. 111-112).

The Court of Appeals then held "The judgment in the state court action was not void, but merely voidable." Title 12, Sec. 95, of the Oklahoma Statutes was cited as the controlling statute applicable to the situation (R. 112), and that Kansas had the same rule (R. 113).

The pertinent part of the statute is as follows:

"Civil actions other than for the recovery of the real property, can be brought within the following

> periods after the cause of action shall have accrued and not afterwards: * * * 3. Within two years: * * * An action for relief on the ground of fraud—the cause of action in such cases shall not be deemed to have accrued until the discovery of the fraud."

There is a definite line of difference in the statutory and case law in both Oklahoma and Kansas between the limitations statute applicable to fraud that results in a "voidable" judgment and a fraud that results in a "void" judgment.

The limitation rule is laid down in the State of Kansas as to "void" judgments in the following language from Sec. 3009 of Title 60, General Statutes, Kansas 1935:

> "A void judgment may be vacated at any time, on motion of party, or any other person affected thereby."

Oklahoma Statutes contains the identical language in Title 12, Sec. 1038 (Oklahoma, combined what is Title 60, Sec. 3008, and Sec. 3009 of the Laws of Kansas in Section 1038).

The statutes and the case law applicable to cases involving fraud wherein the court has jurisdiction of the parties and the subject matter, was misapplied by the United States Court of Appeals here, wherein the judgment in question was rendered by a court that had no jurisdiction of the party.

Supreme Court decisions of the States of Oklahoma and Kansas have uniformly held that the unauthorized appearance of an attorney does not confer jurisdiction upon a court to enter a judgment of any standing whatsoever.

They hold that such judgment so entered on the unauthorized appearance of an attorney, is a completely void judgment, and, like a dead limb on a tree, may be lopped off at any time.

Does the decision of the United States Court of Appeals, which is contrary to the rulings of the Supreme Courts of two states within its circuit, contrary to the statutes of those two states and which is contrary to the due process constitutional rights of a party, merit consideration of the Supreme Court of the United States?

ERRORS RELIED UPON

The United States Court of Appeals erred in holding that the two-year statute of limitations applied to relief sought upon a judgment that is void for want of jurisdiction.

The only question presented to this Court is whether, under the law of the States of Oklahoma and Kansas, the two-year statute of limitations applies to relief sought in equity from a judgment in which the sole source of the jurisdiction of a party defendant was the act of an unauthorized attorney, in filing a disclaimer and entrance of appearance.

ARGUMENT

The opinion recognizes that the Federal Courts are bound by the local law that is applicable to the factual situation presented (R. 113).

The Supreme Court of the State of Kansas laid down the rule that is controlling in Kansas and binding on Okla-

homa as early as 1891, in the case of *First National Bank of Newton et al.* v. *William B. Grimes Dry Goods Company,* 45 Kan. 510, 26 Pac. 56, in the second syllabus written by the Court in that case:

> "A judgment rendered against a person without any service of summons upon him and without any appearance by him, and only upon an appearance made by an unauthorized attorney, which appearance has never been ratified or confirmed is absolutely void as to the person for whom the appearance was made."

To the same effect see *Steele* v. *Duncan,* 47 Kan. 511, 28 Pac. 206.

The State of Oklahoma has consistently followed the same rule announced by the Supreme Court of Kansas as indicated in the case of *Street* v. *Dexter,* 182 Okla. 360, 77 Pac. (2d) 707, wherein the Court's syllabus is substantially the same as stated by the Kansas Supreme Court and is as follows:

> "Where the appearance of an attorney on behalf of a party was wholly unauthorized and was entered by mistake or inadvertence a judgment taken by default without proper service of process is void."

The United States Court of Appeals in the opinion herein does not follow the rule but states it in this language:

> "The judgment of the state court action was not void, but merely voidable" (R. 112).

The rule stated in the opinion is quite different from that announced by the Supreme Courts of the States of Kansas and Oklahoma.

It is in cataloging the fraud in question here as coming under Title 12, Section 95, Oklahoma Statutes, Title 60 (Sec. 306 Gen. Kan. Statutes, 1935), that the Court of Appeals has fallen into error.

The section of the statute relied upon is from the general limitation statute pertaining to general claims. The Court of Appeals might better have cited as a basis for its opinion, the special statutes of limitations that both of these states have in identical form, pertaining to the setting aside of judgments.

The Kansas Statute, at Title 60, Sec. 3007, and the Oklahoma Statutes, Title 12, Sec. 1031, give as the "fourth" provision relating to the powers of the District Courts to vacate or modify their own judgments, the following item.

> "For fraud practiced by the successful party in obtaining judgment or order."

Then follows the section of the statutes of both states that set out the time, within which action to set aside judgments may be filed.

> "Proceedings to vacate or modify a judgment or order, for the causes mentioned in subdivision four, five, and seven of Section 5267 (1031 and 3007) must be commenced within two years after the judgment was rendered or order made, unless the party entitled thereto be an infant or person of unsound mind and then, within two years after removal of such subdivisions three and six of the same section shall be within three years and a subdivision nine, within one year after the defendant has notice of the judgment. *A void judgment may be vacated at any time,* on motion of a party or any person affected thereby" (Italics ours).

A Judgment Rendered in a Court Without Jurisdiction of the Parties and of the Subject Matter Is Void. The Statute of Limitations Applicable to Judgments Involving Fraud in Cases Where the Court Has Jurisdiction Does Not Apply to Those Cases Where the Court Has No Jurisdiction.

In giving credence to the two-year limitations statute relative to fraud in the obtaining of a judgment and the provision that states that a void judgment may be set aside at any time, the Supreme Courts of these states have drawn the line of demarkation between the judgment in cases where the court undeniably had jurisdiction in which a fraud was perpetrated in the securing of the judgment, on the one hand, and those cases where a judgment was rendered involving fraud that goes to the jurisdiction of the court, on the other hand. The two-year statute of limitations is held to apply to the first and the provision of the statute that "a void judgment may be set aside at any time" is held to apply to the latter. The first are interpreted to be the "voidable judgments" and the latter to be "void judgments".

This case falls within the latter "void judgment" category inasmuch as the fraud complained of goes directly to the jurisdiction of the court over the party, as there was no summons or other process served upon the Farmers Mutual in the Garvin County suit. It is merely the question of whether or not the rule of due process of law has been fulfilled in the obtaining of the judgment as stated in *Street* v. *Dexter,* 182 Okla. 360, 77 Pac. (2d) 707.

> "Section 7 of Article 2 of the Constitution of the State of Oklahoma provides: 'No person shall be de-

prived of life, liberty, or property, without due process of law,' To hold that a defendant could be deprived of his property without service, without his day in court, would be depriving him of property without due process of law and in contravention of this section of the constitution.

"By the weight of authorities and the better reasoning, a court of equity has jurisdiction to vacate or otherwise relieve against a judgment in a cause at law in which the defendant was not served with process and of which suit he had no notice."

In cases in these two states where the only source of jurisdiction over a particular party is an unauthorized appearance of an attorney, any judgment rendered thereon is "void" and of no more effect than a judgment rendered in excess of the court's jurisdiction as pertaining to subject matter.*

Oklahoma and Kansas have interpreted the facts in this case as falling within that category of cases in which the court does not have any jurisdiction of the parties.

The fraud involved goes directly to the right of the court to issue a judgment of any standing whatsoever and is not to be compared with those frauds that result in a judgment in cases in which the court unquestionably had jurisdiction of the parties, and of the subject matter. An examination of the authorities used as supporting the decision of the United States Court of Appeals brings out

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*LeClair v. Calls Him, 106 Okla. 247, 233 Pac. 1087;

Central National Oil Co. v. Continental Supply, 119 Okla. 190, 249 Pac. 347;

Grubb v. Fay State Bank, 119 Okla. 199, 249 Pac. 341.

that in each case there was no question as to the power of the court over the litigant and over the subject matter involved. None of the authorities upon which the United States Court of Appeals decision is based involved cases in which there was an absence of jurisdiction.

These cases that involve fraud after the court had jurisdiction of the subject matter and of the parties are "voidable judgments". It is to them that the two-year statute of limitations applies.

The mere fact that the word "fraud" was used in the fourth section of the grounds upon which the District Court could set aside its judgment in Sec. 1031, Oklahoma Statutes, and Section 1038, provided a two-year limitations statute upon actions based upon fraud, does not mean that the mere expiration of the two-year period would add any greater strength to a judgment rendered without any jurisdiction whatsoever. This portion of the statutes covers only those judgments that are "voidable".

Two years had expired before any action was taken upon the judgment in the case of *Hatfield et al.* v. *Lewis*, 110 Okla. 98, 236 Pac. 611. That case was another in which an unauthorized appearance was made by an attorney purporting to represent a defendant and in which a judgment was rendered against that defendant; is held:

> "Where one of several codefendants is a nonresident and has not been served with process and has neither voluntarily appeared nor authorized an attorney to appear and plead for him, nor authorized a codefendant or any person to employ counsel for him, such

defendant is not bound by any act of an unauthorized attorney and a judgment rendered against such defendant is *void* and *a nullity*" (Italics ours).

The Supreme Court of the State of Oklahoma did not state that the judgment was "voidable", it stated emphatically that it was "void and a nullity". This opinion is directly opposite to that of the United States Court of Appeals opinion here. The judgment rendered thereon was not "voidable", as classified in the opinion in the Federal Court; it is "void".

The United States Court of Appeals opinion is also in direct conflict with the case of *Griffin* v. *Galbraith*, 114 Okla. 208, 247 Pac. 339. Here again there was the question of the effect of the unauthorized appearance of an attorney and the Supreme Court of Oklahoma held that the judgment rendered upon such unauthorized appearance of the attorney was "void".

This particular case is one involving an Indian's property and emphasizes the necessity of the maintaining of the established rule in Oklahoma as to the effect of an unauthorized appearance of an attorney as the sole basis of court jurisdiction.

The established authorities of Oklahoma and Kansas could hardly be more explicit in settling the rule as to whether a judgment rendered upon an unauthorized appearance of an attorney is a void judgment and directly within the provisions of the statutes that state that a void judgment may be set aside at any time. *Wheatland Grain and Lumber Co.* v. *Dowden*, 26 Okla. 441, 110 Pac. 898, is another case that holds that such judgment is void.

The amendment offered seeking relief from the arm of equity is a proper procedure,* and the United States Court of Appeals for the Tenth Circuit recognized and this right in the case of *U. S.* v. *Mashunkashey,* 72 Fed. (2d) 847, in exercising its powers. The Federal Court should follow the state rules on the statutes of limitations,** and it is difficult to understand how the appellate court in this matter failed to observe the statutes of the States of Kansas and Oklahoma that specifically apply to setting aside a void judgment, and proceeded to deviate from the authorities of these two states that most definitely hold under parallel facts, that the judgment rendered is absolutely void and subject to be set aside at any time.

It is most important that the Supreme Court of the United States exercise its supervising power to prevent the upsetting of recognized Supreme Court decisions of the States of Oklahoma and Kansas, and to prevent the nulli-

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*American Surety Co. v. Baldwin, 287 U. S. 156, 77 L. Ed. 231, 53 Sup. Ct. 98;

Arrowsmith v. Gleason, 129 U. S. 52, 32 L. Ed. 630, 9 Sup. Ct. 193;

Barrow v. Hunton, 99 U. S. 80, 25 L. Ed. 407;

Howard v. DeCordova, 177 U. S. 609, 44 L. Ed. 908, 20 Sup. Ct. 817;

Johnson v. Waters, 111 U. S. 640, 28 L. Ed. 547, 4 Sup. Ct. 619;

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Annotation 160 A. L. R., p. 1339-1365.

**Guaranty Trust Co. v. York, 326 U. S. 99, 108-9 89 L. Ed. 2079, 65 Sup. Ct. 1464;

Cities Serv. Oil Co. v. D. P. Dunlap et al., 308 U. S. 208-213, 84 L. Ed. 196, 60 Sup. Ct. 201.

fying of the particular section of the statute under which the facts in this case fall*.

CONCLUSION

It has never been more important to maintain the integrity of the courts of the land. To permit frauds upon the courts themselves to be used as the means to deprive a person of property without due process of law and without any chance of a trial is a vital matter that not only concerns the parties that may be before the Court at the moment, but also concerns the respect of the public for that branch of the Government to which it looks for protection of their inalienable rights.

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*Cities Service Oil Co. v. Dunlap, 308 U. S. 208, 84 L. Ed. 196, 60 Sup. Ct. 201;

Equitable Life Ins. Co. v. Halsey, Stuart & Co., 312 U. S. 410, 85 L. Ed. 920, 61 Sup. Ct. 623, rehearing denied 312 U. S. 688, 85 L. Ed. 1146, 61 Sup. Ct. 623;

Fidelity Union Trust Co. v. Field, 311 U. S. 169, 85 L. Ed. 109, 61 Sup. Ct. 176, rehearing denied 311 U. S. 730, 85 L. Ed. 475, 61 Sup. Ct. 438;

Klaxton Co. v. Stentor Electric Mfg. Co., 313 U. S. 487, 85 L. Ed. 1477, 61 Sup. Ct. 1020;

Palmer v. Hoffman, 318 U. S. 109, 87 L. Ed. 645, 63 Sup. Ct. 477;

Moore v. Illinois Central R. Co., 312 U. S. 630, 85 L. Ed. 1089, 61 Sup. Ct. 754;

Russell v. Todd, 309 U. S. 280, 84 L. Ed. 754, 60 Sup. Ct. 527, rehearing denied, 310 U. S. 658, 84 L. Ed. 1421, 60 Sup. Ct. 1091;

Six Companies of California v. Joint Highway Dist., 311 U. S. 180, 85 L. Ed. 114, 61 Sup. Ct. 186, rehearing denied 311 U. S. 730, 85 L. Ed. 475, 61 Sup. Ct. 438;

Stoner v. New York Life Ins. Co., 311 U. S. 464, 85 L. Ed. 284, 61 Sup. Ct. 336, rehearing denied, 312 U. S. 713, 85 L. Ed. 1144, 61 Sup. Ct. 609;

Vandenbark v. Owens, Illinois Glass Co., 311 U. S. 538, 85 L. Ed. 327, 61 Sup. Ct. 347;

West v. American Telephone & Telegraph Co., 311 U. S. 223, 85 L. Ed. 139, 61 Sup Ct. 179, 132 A. L. R. 956.

This Court should concern itself with the decision herein which will endanger the property rights of innocent persons. It is a greater problem in the State of Oklahoma than in the ordinary state because of the fact that the five civilized Indian tribes received their allotment of Government land in that state. The inability of these aborigines to properly protect their own interest is manifest in the Federal statutes regulating the conveyances of their land and in the numerous cases that come before this Court involving an undue advantage taken of the Indians.

Many of these Indian lands have become immensely valuable for oil in the past and many more will become valuable for oil in the future. The means used by the defendant, Trapp, in this matter, should not be opened as a method by which additional raids may be made upon the property of Government wards in Oklahoma.

But most important of all the United States Court of Appeals opinion should not be permitted to stand when it will upset the statutory and Supreme Court law of two states in a single blow.

Respectfully submitted,

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Counsel for Petitioner.

July, 1949.

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No. 208

Supreme Court of the United States

OCTOBER TERM, 1948

GULF COAST WESTERN OIL CO., INC.,
Petitioner and Appellant below,

VERSUS

M. E. TRAPP,
Respondent and Appellee below.

ANSWER BRIEF OF M. E. TRAPP, RESPONDENT AND APPELLEE BELOW TO PETITION FOR WRIT OF CERTIORARI

RAM MORRISON,
Attorney for M. E. Trapp, Appellee.

August, 1949.

VITERBACK TYPEWRITING CO., 12 SOUTH WALKER, OKLAHOMA CITY, OKLA., PH. 2-9780

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No. 208

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STATEMENT OF FACTS FROM THE RECORD

For the convenience of the Court, I will make a short statement of the record facts.

This action was commenced December 7, 1943 (R. 94). After several motions to make more definite were sustained by the trial court, the pleader reached a stage where it was unable or unwilling to further amend. To the Second Amended Petition, the trial court sustained a motion to dismiss for failure to state a cause of action (R. 101). This order was appealed to the United States Court of Appeals (10 C. C.). The opinion is officially reported in 165 Fed. (2d) 343. The United States Court of Appeals affirmed the trial court on its order of dismissal of the Second Amended Petition except as to paragraph numbered II (12), (13), (14), (15), (16), (17), (18) and (19). Said portion of the

petition was reinstated in the District Court on February 6, 1948, for further proceedings (R. 103). On February 19, 1948, the Appellee filed his Answer (R. 104). On February 26, 1948, Appellant filed an application to amend that portion of the petition reinstated by the order of the United States Court of Appeals (R. 44). On March 6, 1948, Appellee filed a motion to disallow the application and to strike the same from the files (R. 56). On May 21, 1948, the trial court entered an order sustaining the motion (R. 59). The trial court filed a memorandum opinion (R. 59). No petition for rehearing was filed, or appeal notice given within ninety days from the date of this order.

On July 12, 1948, a trial was had on the Paragraph II (12), (13), (14), (15), (16), (17), (18) and (19). The trial court's findings are at page 75. The judgment entered by the trial court on July 28, 1948, is at page 79.

On August 4, 1948, a motion for new trial was filed by the Appellant (R. 62). In said motion no complaint or error was alleged with respect to the trial on July 12, 1948. The only error complained of in the motion for new trial was an alleged error in the order of the trial court dated May 21, 1948.

In addition to the grounds stated in Appellee's motion (R. 44), the Appellee urged in the United States Court of Appeals, that the District Court's order of May 21, 1948, was a final order, and therefore the appeal of the Appellant to the United States Court of Appeals was not in time.

The United States Court of Appeals sustained the judgment of the trial court upon the grounds set out in Appellees' answer in paragraph numbered III (R. 111).

In the proposed amendment, to the reinstated paragraphs, the Appellant seeks to attack a judgment of the State District Court of Garvin County, by alleging that said judgment was obtained by fraud. The judgment roll shows that the state court had jurisdiction of the parties, jurisdiction of the subject matter and the power to enter the judgment. The Appellant seeks to prove dehors the record, that the general appearance and disclaimer filed by the attorney for the Appellant in that cause was not authorized. The judgment roll shows that a general appearance and disclaimer was filed by said attorney and the court's judgment recited (R. 54):

> "The Court further finds that Lon R. Stansbery, C. E. Witmer and the Farmers Mutual Royalty Syndicate, a corporation, have entered their general appearance in said cause and disclaimed any right, title, or interest in and to said real estate and premises, or any part thereof, and that W. W. Williams has entered a general appearance and filed an answer in said cause, and that each of said parties are in default of other or further pleading than above stated."

In the opinion of the United States Court of Appeals, affirming the judgment of the trial court, the Court held that said judgment was voidable. The Appellant contends that the judgment was "absolutely void." This is the only error assigned here.

ARGUMENT

In Appellant's brief, Appellant cites and relies on the case of *Street* v. *Dexter,* 182 Okla. 360, 77 Pac. (2d) 707. In the opinion the State Supreme Court cites and

quotes from *Griffin* v. *Galbraith*, 114 Okla. 208, 247 Pac. 339, and *Hatfield* v. *Lewis*, 110 Okla. 98, 236 Pac. 611, which cases are also cited by the Appellant in its brief before this Court. In *Street* v. *Dexter*, the Court quotes and approved this statement from Ruling Case Law, 2 R. C. L., page 235:

> "* * * Where an attorney at law appears for a defendant not served with process, the presumption is that he was authorized to do so; in other words, his appearance is *prima facie* evidence of his authority, * * * but when such authority is denied or properly put in issue, it is competent to rebut by proof any presumptions which may arise from such acts. If the attorney was without authority, then his acts could bind no one.
>
> "Where the court acquires jurisdiction of an action solely by the appearance of an attorney, the party for whom the appearance was made may deny the authority of such attorney, and if the appearance was unauthorized, may secure the vacation of the judgment, but the want of authority must be clearly made to appear, in order to warrant the court in vacating the judgment."

In *Myers* v. *Chamness*, 102 Okla. 131, 228 Pac. 988, the State Supreme Court held that a judgment rendered on an unauthorized appearance by attorneys, and without service of summons on the defendant is voidable.

A judgment is "void on its face" within the rule that a judgment void on its face may be vacated on motion at the term at which it was rendered, when it requires only inspection of the judgment roll to show its invalidity. *Steiner* v. *Smith*, 115 Okla. 205, 242 Pac. 207; *Cara-*

way v. *Overholser*, 182 Okla. 357, 77 Pac. (2d) 688; *American Exchange Corporation* v. *Lowry*, 178 Okla. 433, 63 Pac. (2d) 71.

Statutory provision that void judgment may be vacated at any time on motion applies only when judgment roll shows invalidity. *Crowther* v. *Schoonover*, 130 Okla. 249, 266 Pac. 777; *Bledsoe* v. *Green*, 138 Okla. 15, 280 Pac. 301; *Green* v. *Jones*, 147 Okla. 273, 296 Pac. 743; *Town of Watonga* v. *Crane Co.*, 189 Okla. 184, 114 Pac. (2d) 941.

CONCLUSION

It, therefore, appears that there is no merit to the contention of the Appellant in its application for a Writ of Certiorari before this Court.

Respectfully submitted,

RAM MORRISON,

Attorney for M. E. Trapp, Appellee.

August, 1949.